

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ANTHONY ALLEN,

No CV-06-7547 VRW

Plaintiff,

ORDER

v

MICHAEL J ASTRUE, Commissioner of
Social Security,

Defendant.

Plaintiff Anthony Allen brings this action under 42 USC section 405(g), challenging the final decision of the Social Security Administration (SSA) denying him social security disability benefits. Pl Mot (Doc #7); Def Mot (Doc #13). The parties have filed cross-motions for summary judgment. For the reasons that follow, the court GRANTS plaintiff's motion for summary judgment and DENIES defendant Michael J Astrue's motion for summary judgment. This matter is remanded to the SSA.

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A

Plaintiff was born on August 22, 1954. Administrative Record (AR) 348. Plaintiff was forty-nine years old at the time of his application but was treated by the Administrative Law Judge (ALJ) as being over age fifty for purposes relevant to his claim. AR 379. Plaintiff completed high school and thereafter entered an apprenticeship to become a butcher. AR 348. He worked as a butcher for eighteen years. AR 350. Plaintiff stopped working on January 29, 2004 and has not returned to employment since. AR 105.

Plaintiff's chief complaint is lower back pain that radiates to his hips and down his legs. AR 352. Plaintiff stated that the pain "runs through my legs, sort of like an electric shock, all the way out to my toes. And at times it's so intense it's crippling." Id. Plaintiff alleged that he can only lift five to ten pounds, cannot stand for long periods of time, cannot sit upright and experiences tingling and numbness. AR 105. He reported that he is able to do grocery shopping once a week, dust and clean windows for ten minutes at a time and drive a car for about four to five miles. AR 121. For pain, plaintiff takes 500 mg of Vicodin once every six hours, 350 mg of Soma three times daily and 800 mg of Motrin once every eight hours. AR 122, 128. Plaintiff also claimed that he is depressed as a result of his physical condition and takes 20 mg of Prozac once daily. AR 122. Plaintiff's wife, Alice Allen, stated that plaintiff is unable to perform yardwork, is so preoccupied with pain that he forgets to shower and brush his teeth, can only do laundry with her assistance and does not participate in social activities. AR 139-47.

1 Plaintiff stated that he was first injured on December
2 21, 1999, while stacking frozen turkeys at Albertson's. AR 208.
3 Plaintiff was seen at the Oakland Kaiser Permanente facility for
4 this injury. Id. He later visited a doctor through his employer's
5 medical plan with Concentra and was diagnosed with "lumbosacral
6 strain." Id. Plaintiff did not work for two weeks and was treated
7 with rest, medications, physical therapy and exercises. Id.
8 Plaintiff continued to have pain in his lower back and saw a
9 physician at the Oakland Kaiser Permanent facility, Dr Ed Seegers,
10 MD, for treatment. Id. Dr Seegers directed plaintiff to take
11 Motrin and plaintiff began taking 800 mg of Motrin three times
12 daily so that he could continue to work. Id. Plaintiff resumed
13 work thus medicated. Id.

14 After lifting a case of fresh chickens on January 27,
15 2004, plaintiff reported increased lower back pain and new pain his
16 trapezius muscles. Id. Plaintiff soon after consulted Dr Mogro, a
17 psychologist at Kaiser Permanente, for depressed feelings. Id. On
18 January 29, 2004, two days after the second incident, Dr Mogro took
19 plaintiff off work. AR 209. Plaintiff also saw Dr Leavitt, a
20 psychiatrist at Kaiser, who prescribed Prozac. Id.

21 Plaintiff did not seek medical attention for the increase
22 in his lower back pain or his paracervical discomfort until March
23 1, 2004 when he returned to Dr Seegers at the Oakland Kaiser
24 Permanente facility. Id. Dr Seegers did not recommend any new
25 treatment, but rather continued use of Motrin as before. Id.
26 Plaintiff later consulted an attorney who referred him to a
27 physician, Dr Jonathan Francis, MD. AR 178, 215.

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1 Dr Francis became plaintiff's treating physician. AR
2 276. On March 18, 2004, Dr Francis examined plaintiff and wrote a
3 "confirmatory medical orthopedic consultation: worker's
4 compensation" in which he noted that plaintiff had symptoms of back
5 pain, intermittent blurred vision, increased fatigability,
6 difficulty sleeping, nervousness, depression, memory lapses, fear,
7 anxiety, emotional stress and general loss of enjoyment of life.
8 AR 270. Dr Francis also found that plaintiff had "marked limited
9 mobility present in the lumbar spine" and positive straight leg
10 raising. AR 273. Dr Francis recommended physiotherapy and ordered
11 a magnetic resonance imagining study (MRI) of the lumbar spine and
12 a pelvic x-ray. AR 274.

13 On March 25, 2004, radiologist Dr Tom H Piatt, MD, took a
14 pelvic x-ray of plaintiff and concluded that plaintiff had a
15 possible right femoral neck stress fracture. AR 190. Dr William V
16 Glenn Jr, MD, a diagnostic radiologist, took an MRI of plaintiff's
17 lumbar on the same day and found that there was "disc protrusion or
18 herniation with associated endplate osteoarthritic ridging broadly
19 indenting [the] thecal sac" at L4-5. AR 192. Dr Glenn also found
20 a "disc/annulus bulge * * * in conjunction with endplate ridging
21 indenting [the] thecal sac" at L5-S1. Id.

22 On April 2, 2004, neurologist Dr Nader Armanious, MD,
23 performed a lower extremity nerve conduction study on plaintiff.
24 AR 194. Dr Armanious concluded that plaintiff's left tibial nerve
25 H-reflex was prolonged and that this "could represent S1
26 radiculopathy on the left." AR 195. "Radiculopathy" describes a
27 condition where one or more nerves are affected thus causing pain,
28 weakness, numbness or a lack of muscle control. On April 23, 2004,

1 Dr Armanious diagnosed plaintiff with acute post-traumatic sprain
2 strain of the lumbosacral spine and lumbosacral radiculopathy
3 mainly on the left side. AR 202. Dr Armanious also performed an
4 electromyography study on the same day and determined that there was
5 electrophysiological evidence of moderate chronic radiculopathy at
6 L5-S1 on the left side. AR 205.

7 Plaintiff's workers' compensation insurance carrier sent
8 plaintiff to Dr Giles C Floyd, MD, for an orthopedic evaluation.
9 Pl Mot (Doc #7 at 4). On April 12, 2004, Dr Floyd examined
10 plaintiff and concluded that plaintiff only had a mild disability
11 that was "adequately described by his subjective complaints." AR
12 207, 217. Dr Floyd diagnosed plaintiff with: (1) paracervical
13 muscular strain, by history, resolved and (2) chronic lumbosacral
14 strain without radiculopathy. AR 214. Dr Floyd further concluded
15 that "orthopaedic and neurologic examination in the paracervical
16 region fails to reveal the presence of any demonstrable objective
17 findings," AR 216, but noted mild restriction of lumbar flexion,
18 although without spasm or tightness. AR 217. On x-rays, Dr Floyd
19 found "long-standing, preexisting degenerative disc disease at C4-5
20 with mild spurring, but no acute abnormality" of plaintiff's
21 cervical spine area, id, and "[m]inimal age-related degenerative
22 changes" but "no acute findings" in the lumbar region. Id. Dr
23 Floyd noted, however, that his opinion was made without the lumbar
24 MRI study and the radiology report. AR 216.

25 On July 27, 2004, Dr Jacob Rosenberg, MD, an
26 anesthesiologist and pain medicine specialist, examined plaintiff
27 and wrote a lengthy report concluding that he appeared "to have an
28 S1 radiculitis from an L5-S1 disc protrusion." AR 240. Dr

1 Rosenberg also noted that plaintiff's current limitations were
2 "substantial" based on plaintiff's report that he could sit for
3 only thirty minutes to an hour, had difficulty standing in place,
4 could walk continuously for no more than forty minutes and lift no
5 more than twenty-five pounds without pain. AR 239. Dr Rosenberg
6 further determined that plaintiff could return to work, describing
7 him as "extremely motivated and willing to tolerate a significant
8 amount of pain in order to return to work," subject to limitations,
9 "most notably in lifting and repetitive bending * * *." AR 240-41.
10 On August 6, 2004, Dr Rosenberg again saw plaintiff and treated him
11 with steroid injections to help relieve his back pain. AR 235. Dr
12 Rosenberg concluded that plaintiff "probably has a discogenic
13 problem" and that "a strong rehabilitation program would be
14 appropriate." AR 236.

15 On October 18, 2004, orthopedic surgeon Dr Robert R
16 McIvor, MD, saw plaintiff for a consulting medical evaluation in
17 connection with his application for disability benefits. AR 248.
18 Dr McIvor found plaintiff "permanent and stationary" with no need
19 for anything but conservative medical treatment and a home exercise
20 program. AR 251. Dr McIvor diagnosed "a back strain with a
21 degenerated disc at L5-S1," AR 250, and rated plaintiff's pain as
22 "intermittent minimal to slight." AR 251. He found that plaintiff
23 had "limitation of back motion" and some muscle spasm in his lower
24 back area but no nerve root pressure or irritation. Id. Dr McIvor
25 found plaintiff disabled from work as a butcher due to the need to
26 avoid heavy lifting, repeated bending and stooping. Id.

27 On January 20, 2005, Dr Francis completed a "medical
28 assessment for social security disability applicants," a check-box

1 style form indicating that plaintiff was limited to: (1)
2 occasionally lifting up to ten pounds; (2) prolonged
3 standing/walking for two hours in an eight-hour work day; and (3)
4 prolonged sitting for one to two hours at a time and for two hours
5 in an eight-hour work day. AR 254.

6 On May 18, 2005, Dr Francis noted that plaintiff was
7 "still experiencing rather severe lumbar pain, with marked limited
8 mobility and function of the lumbar spine." AR 221. Dr Francis
9 recommended: (1) a consultation with a neurosurgeon, Dr Roger
10 Shortz, MD, for a possible surgical intervention and/or additional
11 steroid injections; (2) a consultation with a psychiatrist, Dr
12 Michael Kabar, MD, for plaintiff's "severe depression"; (3) a
13 lumbar traction unit for plaintiff to use at home; and (4)
14 physiotherapy for plaintiff once or twice weekly for twelve weeks.
15 AR 221-22. At this point, Dr Francis retired and transferred care
16 of plaintiff to Dr Shortz. AR 178.

17 Dr Shortz referred plaintiff to radiologist Dr Adil
18 Mazhar for an MRI exam using a "vertically oriented MRI system with
19 multi-positioning capabilities." AR 308. Dr Mazhar's August 3,
20 2005 report contained mostly normal findings but noted disc
21 desiccation and osteophytes with disc bulges at L3-4, L4-5 and L5-
22 S1 and "high intensity zones" representing annual tears which "may
23 cause pain." AR 309-10.

24 Dr Shortz also referred plaintiff to neurologist Dr Allen
25 D Bott for a motor nerve study, a sensory nerve study, an H reflex
26 study and an electromyography (EMG) study. AR 314-15. Plaintiff
27 saw Dr Bott on September 1, 2005. Id. Dr Bott found that the test
28 results were largely negative, but noted that the results "could

1 conceivably reflect a remote L5 radiculopathy." Id. Dr Bott was
2 unable to find any other convincing electrical evidence of
3 lumbosacral radiculopathy. Id.

4 On October 10, 2005, Dr Shortz completed a progress
5 report for plaintiff's workers' compensation claim. AR 320. Dr
6 Shortz reviewed plaintiff's MRI taken on August 3, 2005 and noted
7 that plaintiff had a herniated disc at L4-5 with stenosis and that
8 "EMG 9-1-05 was positive at L5 radiculopathy." Id.

9 On February 28, 2006, Dr Shortz filled out a residual
10 functional capacity (RFC) questionnaire stating that plaintiff did
11 not "have the capacity to work full time on a sustained basis at a
12 job which would permit him to sit or stand at will and which
13 required no lifting over [twenty] pounds and no more than
14 occasional stooping crawling bending and balancing." AR 325. Dr
15 Shortz's findings exactly matched the RFC posed by the ALJ to the
16 vocational expert on the record at the January 2006 hearing. Id.
17 There are no further noteworthy medical records addressing
18 plaintiff's orthopedic complaints.

19 Meanwhile, plaintiff separately pursued medical attention
20 for his mental health status. On February 6, 2004, he sought
21 treatment for his depression at Kaiser Permanente. A handwritten
22 intake/diagnostic summary reported that plaintiff felt "angry and
23 mad" and "easily irritated" with "some impairment" as to his
24 memory, attention and concentration. AR 230. The physician
25 diagnosed plaintiff as having major recurrent depression and an
26 "occupational problem." AR 232. Plaintiff took prozac and
27 trazodone and had two further mental health appointments in the
28 spring of 2004, the last of which occurred on May 19. AR 225.

1 On April 30, 2005, Dr Ranald Bruce, PhD, a licensed
2 psychologist, saw plaintiff for a psychological disability
3 assessment. AR 279-80. Dr Bruce diagnosed "depressive disorder
4 NOS" but wrote that plaintiff "did not appear depressed in interview
5 * * * [and] does not describe serious or disabling levels of
6 depression at other times." He found that plaintiff "could carry
7 out simple, detailed and complex instructions" and "should not have
8 problems with concentration, persistence and/or pace in an average
9 work setting for a normal work period"; he estimated plaintiff's
10 intelligence to be in the low average to average range. AR 280.

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13 On November 3, 2004, plaintiff applied for disability
14 insurance benefits giving an onset date of January 29, 2004. AR 65.

15 On December 13, 2004, a non-examining Disability
16 Determination Services (DDS) physician whose signature is illegible
17 completed a physical RFC form and determined that plaintiff could:
18 (1) occasionally lift and/or carry up to fifty pounds; (2)
19 frequently lift and/or carry up to twenty-five pounds; (3) stand
20 and/or walk (with normal breaks) six hours in an eight-hour workday;
21 (4) sit with normal breaks about six hours in an eight-hour workday;
22 and (5) push and/or pull without limitation. AR 281-88. The DDS
23 physician also found plaintiff limited posturally to occasional
24 stooping and crouching. AR 283. This report was affirmed upon
25 review by a different agency physician on May 12, 2005.

26 On May 13, 2005, agency psychiatrist Craig A Smith, MD,
27 completed a Psychiatric Review Technique Form acknowledging
28 plaintiff's affective disorder but marking it "not severe." AR 306.

1 On December 28, 2004, the SSA initially denied plaintiff's
2 application and stated that although plaintiff had a "history of
3 discomfort in [his] back and pelvis," his "muscle strength, feeling,
4 reflexes and ability to bend and move about are sufficient to do
5 some types of work." AR 25-29. On May 19, 2005, the SSA denied
6 reconsideration. AR 31-35.

7 On March 25, 2005, plaintiff filed a timely request for a
8 hearing before an ALJ. AR 36. A hearing was held on January 11,
9 2006 in Oakland, California. AR 344. Plaintiff appeared
10 represented by his attorney, Glenn Clark. AR 346. Vocational
11 expert (VE) Jeff Malmuth also testified at the hearing. AR 344.

12 At the hearing, plaintiff testified that he had lower back
13 pain that radiated down to his legs. AR 352. Plaintiff also
14 explained that he had difficulty sitting, walking for more than a
15 half an hour to forty-five minutes and standing in one position for
16 more than one minute. AR 353-55. He also complained of trouble
17 with reading comprehension, feelings of depression and memory
18 problems. AR 349, 357-58.

19 Plaintiff's counsel stated that plaintiff had not yet
20 received definitive treatment for his back problems due to insurance
21 difficulties and that he was awaiting authorization for surgery and
22 steroid shots. AR 346-47. Plaintiff testified that he had attended
23 physical therapy sessions once a week for twelve weeks and had
24 received one steroid injection to date. AR 360. Plaintiff stated
25 that his employer would not authorize any further physical therapy
26 or injections and that he was never offered vocational
27 rehabilitation training. AR 360-62. Plaintiff also testified that
28 he was then taking Vicodin, Soma, Naprosyn and Paxil. AR 358.

1 For purposes of his examination of the VE, The ALJ placed
2 plaintiff in the age category of fifty or over with the educational
3 level of high school graduate and the occupational skills of a
4 butcher. AR 348, 378-79. In his hypothetical to the VE, the ALJ
5 described a person having "a capacity for light exertional work that
6 would permit the work to be done, even with an optional sit/stand —
7 option to sit, stand at will, and no work at heights, including no
8 climbing of ladders, ropes, or scaffolds," who could only
9 occasionally use ramps and stairs, crouch, crawl, kneel, stoop and
10 balance. AR 380. In response, the VE testified that jobs were
11 available for such an individual at the light or sedentary levels.
12 Id.

13 The VE first testified that plaintiff could perform the
14 job of unarmed security guard. Id. Plaintiff's attorney disagreed
15 that this job could be performed with a sit/stand option. AR 385-
16 86. The ALJ clarified that the sit/stand option meant that "the job
17 can be performed either sitting, or standing at the individual's
18 option" and agreed with plaintiff's counsel that the job of a
19 security guard could not be performed with a sit/stand option. Id.

20 The VE next testified that small product assembler or
21 "assembler of production" jobs would be options that could be
22 performed either sitting or standing. AR 382, 386. The VE stated
23 that 2,351 such jobs exist in the local economy and 357,000 such
24 jobs exist nationally that require standing or walking six hours in
25 an eight-hour day. AR 382-83. The VE estimated that these numbers
26 would be eroded by around 50 percent if the sit/stand limitation
27 were included. AR 389. The VE based his testimony "[o]n hundreds
28 of job analyses that [he has] performed throughout the [B]ay area on

1 similar types of occupations." Id. Upon questioning by plaintiff's
2 counsel, the VE admitted that there were no published materials
3 indicating the number of assembler jobs available in which the
4 workers do not actually have to stand. AR 388. The VE also
5 proposed a "kitchen food assembler" job but withdrew it after the
6 ALJ reminded him that the sit/stand option was a "critical part" of
7 plaintiff's RFC. AR 383. After examination by plaintiff's counsel,
8 the VE agreed to provide the names of some employers in the Bay area
9 who have such assembler positions with a sit/stand option. AR 400.
10 The ALJ held the record open until March 9, 2006 to receive this
11 additional evidence. AR 16.

12 Following the hearing, the VE submitted the names of two
13 employers who had jobs that would accommodate the sit/stand option:
14 "Mr Plastics" and "Mr S Leather CO & Fetters USA Inc". AR 180. In
15 response, plaintiff's counsel submitted his declaration stating that
16 he had, in essence, tested this evidence by speaking over the phone
17 with the president of Mr Plastics, Michael Adelson, and that Mr
18 Adelson had stated that "it was obvious that an individual who had
19 back pain so severely that they could not tolerate prolonged sitting
20 or standing is not employable with his company." AR 185.

21 Plaintiff's counsel also contacted Ray Ellison, the controller
22 administrator at Mr S Leather Company and Fetters USA, and upon
23 questioning, Mr Ellison also stated that the company did not have
24 jobs that would permit a worker to sit/stand at will, but rather
25 sewing jobs requiring prolonged sitting and assembly jobs requiring
26 up to seven hours a day of standing. AR 186.

27 On May 17, 2006, the ALJ issued a decision denying
28 plaintiff disability benefits. AR 16-22. The ALJ applied the five-

1 step sequential evaluation process set forth in the SSA regulations
2 at 20 CFR section 404.1520 (see part II infra) and found, as
3 relevant to this appeal: (1) plaintiff had "severe" impairments in
4 the form of degenerative disc disease of the lumbar spine with
5 possible radiculopathy, a possible pelvic fracture and mild
6 depression; (2) plaintiff does not suffer from any impairment listed
7 in or medically equivalent to an impairment listed in the Listing of
8 Impairments under 20 CFR Part 404, Subpart P, Appendix 1; (3)
9 plaintiff could no longer perform his former work as a butcher; (4)
10 plaintiff retained the RFC for "light work * * * with alternate
11 sitting and standing at will, occasional crouching, crawling,
12 kneeling, stooping, balancing, stair climbing and use of ramps, and
13 no work at heights or use of ladders, ropes, or scaffolds"; and (5)
14 plaintiff could perform work existing in significant numbers in the
15 national economy as enumerated by the VE. AR 17.

16 In determining plaintiff's RFC, the ALJ considered the
17 following medical evidence: (1) the March 2004 MRI of plaintiff's
18 lumbar spine showing disc bulges at L3-4, L4-5 and L5-S1; (2) the x-
19 ray of plaintiff's pelvis showing a possible right femoral neck
20 stress fracture; (3) the medical evaluation by plaintiff's treating
21 physician, Dr Francis, which reported a decreased range of motion in
22 the back and positive straight leg raising; (4) the neurological
23 examination showing a decreased range of motion in plaintiff's back;
24 and (5) the EMG showing evidence of moderate L5-S1 radiculopathy on
25 the left. AR 18.

26 The ALJ also considered reports from several other doctors
27 that found plaintiff significantly less impaired. *Id.*
28 Specifically, the ALJ noted that: (1) Dr Floyd only found a mildly

1 decreased range of back motion and no acute findings on x-rays of
2 plaintiff's cervical and lumbar spines; (2) Dr Rosenberg noted no
3 significant positive findings and found plaintiff's work capacity
4 generally unrestricted with only minor limitations in lifting and
5 repetitive bending; (3) Dr McIvor only noted some decreased range of
6 motion and some muscle spasm and also concluded that plaintiff was
7 only precluded from heavy lifting and repeated bending and stooping;
8 (4) the August 2005 MRI only showed some degenerative changes at L3-
9 4, L4-5 and L5-S1; and (5) the September 2005 nerve conduction study
10 only showed possible L5 radiculopathy. Id.

11 The ALJ gave no weight to the January 2005 opinion of
12 plaintiff's treating physician, Dr Francis finding, inter alia, that
13 plaintiff could only lift up to ten pounds occasionally and sit or
14 stand for one hour at a time up to two hours each per day. Id. The
15 ALJ reasoned that Dr Francis's report should be disregarded since it
16 was "based on 'findings' that are not reflected in his records or
17 those of the other physicians who have examined the claimant * * *."
18 Id.

19 The ALJ also disregarded the post-hearing February 2006
20 RFC questionnaire completed by plaintiff's then-current treating
21 physician, Dr Shortz (Dr Francis's successor) stating that plaintiff
22 could not perform a job involving sitting or standing at will, could
23 not lift more than twenty pounds and could not do more than
24 occasional stooping, crawling, bending and balancing. Id. The ALJ
25 explained that Dr Shortz's conclusion was "completely unpersuasive
26 since, first, there are no records from Dr Shortz indicating
27 findings which would be consistent with such limitations and,
28 second, the fact that Dr Shortz's conclusions essentially mirror the

1 [RFC] [the ALJ] posed to the vocational expert indicates that those
2 conclusions were suggested to him and were not independently reached
3 based on his treatment of the claimant alone." AR 18-19.

4 The ALJ found "no significant erosion of [plaintiff's]
5 occupational base" due to plaintiff's claims of depression noting
6 that plaintiff only received brief treatment for depression
7 concluding in May 2004 and that consulting psychologist Dr Bruce had
8 concluded that there was no evidence that plaintiff had any mental
9 impairment that would limit his ability to work. AR 19.

10 In addition, the ALJ wrote that he did not consider
11 plaintiff's and his wife's statements regarding plaintiff's pain and
12 other symptoms "particularly convincing or credible." Id. The ALJ
13 specifically noted that plaintiff had sought disability benefits
14 based in part on depression. He also noted that plaintiff "can
15 perform a variety of household chores including dusting, cleaning,
16 shopping, light cooking and laundry." Id.

17 The ALJ then credited the VE's testimony that an
18 individual vocationally similar to plaintiff could perform the job
19 of a small products assembler or a production assembler and that an
20 adequate number of such jobs existed. AR 20. The ALJ disregarded
21 the declaration submitted by plaintiff's counsel that cast doubt on
22 the actual availability of such positions at the two employers named
23 by the VE. The ALJ wrote that the "hearsay declaration" contained
24 statements which were "not adduced during the hearing or under oath
25 and which were not subject to cross-examination or similar inquiry"
26 and are "inherently unreliable and [] legally insufficient as
27 evidence." AR 20-21. Since the ALJ found that the job positions
28 identified by the VE could be performed by an individual with such

1 plaintiff's limitations, the ALJ determined that plaintiff was not
2 disabled within the meaning of the Social Security Act. AR 21.

3 The SSA Appeals Council denied plaintiff's request for
4 review of the ALJ's decision. AR 7. On December 6, 2006, plaintiff
5 timely filed the instant action.

6
7 II

8 The court's jurisdiction is limited to determining whether
9 the SSA's final decision to deny benefits is supported by
10 substantial evidence in the administrative record. 42 USC § 405(g).
11 Substantial evidence is more than a scintilla but less than a
12 preponderance; it is such relevant evidence as a reasonable mind
13 might accept as adequate to support a conclusion. Thomas v
14 Barnhart, 278 F3d 947, 954 (9th Cir 2002). A district court may
15 overturn a decision to deny benefits only if the decision is not
16 supported by substantial evidence or if the decision is based on
17 legal error. See Andrews v Shalala, 53 F3d 1035, 1039 (9th Cir
18 1995); Magallanes v Bowen, 881 F2d 747, 750 (9th Cir 1989).
19 Determinations of credibility, resolution of conflicts in medical
20 testimony and all other ambiguities are to be resolved by the ALJ.
21 Morgan v Commissioner of Social Security Administration, 169 F3d
22 595, 599 (9th Cir 1999). The decision of the ALJ will be upheld if
23 the evidence is "susceptible to more than one rational
24 interpretation." Andrews, 53 F3d at 1040.

25 The Act provides that certain individuals who are "under a
26 disability" shall receive disability benefits. 42 USC § 423(a)
27 (1)(D). Disability is the "inability to do any substantial gainful
28 activity by reason of any medically determinable physical or mental

1 impairment which can be expected to result in death or which has
2 lasted or can be expected to last for a continuous period of not
3 less than 12 months." 20 CFR § 404.1505(a). An individual is
4 considered "disabled" if his impairments are such "that he is not
5 only unable to do his previous work but cannot * * * engage in any
6 other kind of substantial gainful work which exists in the national
7 economy * * *." Id.

8 To determine whether a claimant is disabled and entitled
9 to benefits, the SSA conducts a five-step sequential inquiry. 20
10 CFR § 404.1520. Under the first step, the ALJ considers whether the
11 claimant is currently employed in substantial gainful activity. If
12 not, the second step examines whether the claimant has a "severe
13 impairment" that significantly affects his or her ability to conduct
14 basic work activities. In step three, the ALJ determines whether
15 the claimant has a condition which "meets" or "equals" the
16 conditions outlined in the Listing of Impairments in 20 CFR Part
17 404, Subpart P, Appendix 1. If the claimant does not have such a
18 condition, step four asks whether the claimant can perform his past
19 relevant work. If not, in step five, the ALJ considers whether the
20 claimant has the ability to perform other work which exists in
21 substantial numbers in the national economy. If a claimant is
22 unable to perform any other work, then the claimant will be
23 considered disabled. 20 CFR §§ 404.1520(b)-(f); §§ 404.920(b)-(f).

24 The claimant bears the burden of proof at steps one
25 through four of the inquiry. Bustamante v Massanari, 262 F3d 949,
26 953-54 (9th Cir 2001). At step five, the burden of proof shifts to
27 the SSA and to support a finding of "not disabled" the Secretary
28 must prove that there are jobs in the national economy that the

1 claimant can perform. Id.

2 In the instant case, there is no issue at steps one
3 through four of the inquiry. Plaintiff contends, however, that the
4 ALJ erred at step five.

6 III

7 Plaintiff makes three major contentions in support of his
8 motion. First, plaintiff contends that the RFC determined by the
9 ALJ is equivalent to a limitation to sedentary work which thus
10 entitles him to benefits under the Medical-Vocational Guidelines
11 (the "Grids"). Pl Mot (Doc #7 at 6-13). Second, plaintiff argues
12 that the hypothetical propounded to the VE improperly failed to
13 include plaintiff's subjective limitations and that the VE's
14 testimony accordingly lacks evidentiary value and fails to meet the
15 step-five burden. Pl Mot (Doc #7 at 21-23). And third, plaintiff
16 contends that the ALJ failed to meet his duty to fully and fairly
17 develop the record and thus erred in crediting the VE's testimony.
18 Accordingly, plaintiff argues that the ALJ's step-five burden has
19 not been satisfied. Pl Mot (Doc #7 at 13-21).

21 A

22 Plaintiff argues that his RFC as determined by the ALJ is
23 equivalent to a limitation to sedentary work and that the ALJ erred
24 in failing to find him "disabled" under the Grids. Pl Mot (Doc #7
25 at 6). It is the plaintiff's burden to establish this error. See
26 Andrews v Shalala, 53 F3d 1035, 1039 (9th Cir 1995); Magellenes v.
27 Bowen, 881 F2d 747, 750 (9th Cir 1989).

28 The Grids are usually used in social security cases to

1 determine a claimant's disability based on a claimant's RFC, age,
2 educational level and transferability of skills. The Grids provide
3 that an individual is "disabled" if he: (1) has an RFC that limits
4 him to sedentary work; (2) is closely approaching advanced age; (3)
5 has an educational level of high school graduate or more; and (4) is
6 skilled or semiskilled with skills that are not transferable. 20
7 CFR Pt 404, Subpt P, App 2, Table 1, Rule 201.14. An individual of
8 the same background, however, who is limited to "light work" rather
9 than "sedentary work" will be found "not disabled" under the Grids.
10 20 CFR Pt 404, Subpt P, App 2, Table 2, Rule 202.14. Where a
11 claimant's exertional limitation does not readily fall under one of
12 the Grid rules, rather than use the Grids, the ALJ may instead
13 consult a VE to determine whether the claimant is capable of
14 performing substantial gainful work in the economy. Thomas v
15 Barnhart, 278 F3d 947, 960 (9th Cir 2002).

16 The ALJ determined that for purposes of this case,
17 plaintiff should be considered closely approaching advanced age (age
18 50-54) with a high school education and skills that are not
19 transferable. AR 348, 379, 383. The ALJ found that plaintiff's RFC
20 was "[the capacity] to perform light work, as defined at 20 [CFR]
21 404.1567(b), with alternative sitting and standing at will,
22 occasional crouching, crawling, kneeling, stooping, balancing, stair
23 climbing and use of ramps and no work at heights or use of ladders,
24 ropes or scaffolds." AR 18.

25 Plaintiff is clearly unable to perform a full range of
26 light work and accordingly does not satisfy the Grid requirements of
27 Rule 202.14. Specifically, plaintiff cannot perform "substantially
28 all" of the activities specified in the definition of "light work"

1 under 20 CFR 404.1567(b) such as: (1) lifting no more than twenty
2 pounds at a time with frequent lifting or carrying of objects
3 weighing up to ten pounds; (2) walking or standing "a good deal";
4 and (3) sitting most of the time with some pushing and pulling of
5 arm or leg controls. Thus, the ALJ properly refrained from applying
6 Rule 202.14 to plaintiff's case.

7 Accordingly, the main issue is whether plaintiff's RFC as
8 determined by the ALJ limits him to performing "sedentary work"
9 which would entitle him to a finding of "disabled" under Rule
10 201.14. Plaintiff contends that the limitations set forth by this
11 RFC are "no more than the ability to perform sedentary work * * *."
12 Pl Mot (Doc #7 at 8).

13 There is not enough information in the record to support a
14 finding that plaintiff is limited to performing sedentary work and
15 therefore disabled under Grid Rule 201.14 such as testimony by the
16 VE, findings by the ALJ and/or medical opinions that plaintiff can
17 only perform sedentary work or that plaintiff's RFC as determined by
18 the ALJ is the equivalent of sedentary work. Since the record as it
19 stands does not clearly support a determination that plaintiff is
20 limited to performing sedentary work, Grid Rule 201.14 does not
21 control this case.

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23 B

24 Plaintiff next contends that the hypothetical posed to
25 the VE at the hearing improperly failed to include plaintiff's
26 subjective complaints of pain and that the ALJ erred in finding
27 plaintiff's subjective complaints of pain not credible. Pl Mot
28 (Doc #7 at 21-23).

1 The law governing the ALJ's responsibilities in cases
2 involving excess pain is well-developed in this circuit. "Excess
3 pain" is "pain at a level above that supported by medical
4 findings." Chavez v Department of Health and Human Services, 103
5 F3d 849 (9th Cir 1996). If a plaintiff is able to produce
6 objective medical evidence of an underlying impairment, an ALJ may
7 not reject his subjective complaints based solely on lack of
8 objective medical evidence to corroborate the alleged severity of
9 pain. Moisa v Barnhart, 367 F3d 882, 885 (9th Cir 2004). If the
10 ALJ finds the claimant's pain testimony not to be credible, the ALJ
11 "must specifically make findings that support this conclusion."
12 *Id.* Absent "affirmative evidence that the claimant is
13 malingering," the ALJ must provide clear and convincing reasons for
14 rejecting the claimant's testimony regarding the severity of the
15 symptoms. *Id.* "General findings are insufficient; rather, the ALJ
16 must identify what testimony is not credible and what evidence
17 undermines the claimant's complaints." Lester v Chater, 81 F3d
18 821, 834 (9th Cir 1996).

19 The ALJ's reasoning for discrediting the testimony about
20 plaintiff's pain was as follows:

21 In this case, I do not find the claimant's
22 statements and those of his wife regarding the
23 claimant's pain and other symptoms particularly
24 convincing or credible. Rather, I note that while
25 the claimant has reported that he takes medications
26 for his back pain and has received other treatments
27 for his back pain, as indicated, he has sought no
28 active treatment for depression since May 2004 even
though he has alleged disability due, in part, to
depression. I further note that the claimant and
his wife have reported that he can perform a variety
of household chores including dusting, cleaning,
shopping, light cooking and laundry.

AR 19.

1 The record in this case contains objective medical
2 evidence demonstrating that plaintiff has an underlying impairment,
3 including a pelvic x-ray showing a possible right femoral neck
4 stress fracture and MRIs of plaintiff's lumbar area showing disc
5 protrusion or herniation and disc bulges that "could cause pain."
6 AR 190, 192, 308-10. Given this evidence in the record, the ALJ
7 was required to make an affirmative finding of malingering in order
8 to discredit plaintiff's subjective complaints. He did not do so.
9 AR 16-22.

10 The ALJ did not, moreover, provide clear and convincing
11 reasons for disregarding plaintiff's testimony regarding his pain.
12 The ALJ's analysis rests on two points. First, he takes the
13 unusual step of using plaintiff's inclusion of "depression" in his
14 application for benefits to find him not credible because the
15 depression was determined not to be severe. While over-inclusion
16 of complaints may not be exemplary, it is a common practice that
17 may reflect improper advice rather than dishonesty. It alone does
18 not constitute clear and convincing evidence that the claimant is
19 not credible. Second, the ALJ noted that plaintiff and his wife
20 reported that he was capable of performing various household
21 chores. *Id.* Closer review of the record, however, demonstrates
22 that plaintiff and his wife both stated that plaintiff was only
23 capable of performing a limited version of those household chores.
24 AR 139-55. Moreover, to be disabled one need not be "utterly
25 incapacitated." Benecke v Barnhart, 379 F3d 587, 594. The ALJ did
26 not meet the legal requirements for rejecting plaintiff's pain
27 testimony.

28 \\\

1 Accordingly, the court is required to credit plaintiff's
2 pain testimony. Lester v Chater, 81 F3d 821, 834. This is not a
3 case, however, in which "the claimant would be disabled if his
4 testimony were credited," id at 834. Plaintiff's hearing testimony
5 establishes both that he could walk for up to one-half hour and
6 perform various other activities then, and that he planned to
7 pursue opportunities for further therapy and treatment as well as
8 vocational rehabilitation. AR 353-65. On this record, as
9 previously noted, it cannot be determined that plaintiff is
10 permanently limited to sedentary work and therefore "disabled"
11 under the Grid rules.

C

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14 Plaintiff last contends that the ALJ should not have
15 credited the VE's testimony without further development of the
16 record and that as such, the ALJ's step-five burden has not been
17 met. Pl Mot (Doc #7 at 13); Pl Reply (Doc #14 at 6-7).
18 Specifically, plaintiff argues that the ALJ solely relied on the
19 testimony of the VE to meet his step-five burden, but that the VE's
20 testimony should not have been credited without further inquiry
21 since it was self-contradictory and appeared to be inaccurate. Pl
22 Reply (Doc #14 at 5-7).

23 The ALJ in a social security case has a "duty to fully
24 and fairly develop the record and to assure that the claimant's
25 interests are considered." Tonapetyan v Halter, 242 F3d 1144, 1150
26 (9th Cir 2001). This duty extends to both represented and
27 unrepresented claimants. Id. The ALJ's duty to supplement the
28 record "is triggered by ambiguous evidence, the ALJ's own finding

1 that the record is inadequate or the ALJ's reliance on an expert's
2 conclusion that the evidence is ambiguous." Webb v Barnhart, 433
3 F3d 683, 687 (9th Cir 2005).

4 Plaintiff argues that the ALJ should not have credited
5 the VE's testimony without further inquiry for several reasons.
6 First, plaintiff contends that the VE's testimony was repeatedly
7 self-contradictory. Pl Mot (Doc #13 at 14). For example, the VE
8 first testified that plaintiff could perform the job of a security
9 guard but later changed his opinion upon cross-examination by
10 plaintiff's counsel. Id. The VE then changed his testimony and
11 stated that the job of a security guard could not be performed with
12 a sit/stand option. Id. Plaintiff also contends that the VE
13 contradicted himself when he testified that plaintiff had
14 transferable skills and could work as a food assembler, and then
15 later admitted that such a job would not accommodate a sit/stand
16 option. Id. Plaintiff further argues that the VE initially
17 testified that 2,351 light assembly jobs existed in the Bay area
18 which plaintiff could perform and that again upon questioning by
19 plaintiff's counsel, the VE admitted that this estimate would be
20 further eroded due to plaintiff's need to sit/stand at will. Id.

21 In addition, plaintiff argues that the VE conceded that
22 his testimony regarding the availability of jobs that plaintiff
23 could perform that afforded a sit/stand option was not
24 substantiated by any published data and was based merely "[o]n
25 hundreds of job analyses that [the VE] performed throughout the
26 [B]ay area on similar types of occupations." Pl Reply (Doc #14 at
27 5). When asked by plaintiff's counsel for the names of specific
28 employers, the VE could only name two employers. Id.

1 Plaintiff's counsel attempted to investigate the
2 credibility of the VE's testimony and submitted a declaration to
3 the ALJ stating that these two employers denied the existence of
4 any such position that would allow for a sit/stand option. AR 184-
5 86. The ALJ disregarded this declaration in its entirety as
6 hearsay evidence. AR 20. 42 USC section 405(b)(1) explains,
7 however, that the rules of evidence do not apply to social security
8 hearings. In administrative settings such as social security
9 cases, hearsay may constitute substantial evidence and is
10 admissible if it has probative value and bears indicia of
11 reliability. Calhoun v Bailar, 626 F2d 145, 149 (9th Cir 1980).
12 The ALJ in this case employed a formalistic application of the
13 hearsay rule to reject the post-hearing evidence submitted by
14 plaintiff's counsel. AR 20. The declaration, however, clearly
15 throws doubt on the accuracy of the VE's already confused testimony
16 and appears reliable, since the two employers quoted have no
17 apparent reason to lie and the declaration is signed and sworn
18 under penalty of perjury by plaintiff's counsel, Glenn Clark.
19 Since hearsay evidence may be allowed in social security cases and
20 the declaration submitted by counsel appears to be admissible, the
21 court finds that the ALJ disregarded the declaration for improper
22 reasons and that, on remand, the agency should develop a more
23 competent record regarding the availability of jobs matching
24 plaintiff's RFC at step five.

IV

27 The SSA has not met its burden at step five of showing
28 plaintiff is capable of performing work substantially available in

1 the national economy. The record in this case remains murky and
2 contains significant inconsistencies, but the ALJ did not handle
3 those inconsistencies in a legally correct manner. As noted above,
4 this case is not an appropriate one to remand for an award of
5 benefits.

6 The matter is remanded to the SSA for further examination
7 and re-evaluation at step five, including enhancement of the record
8 if appropriate. Benecke v Barnhart, 379 F3d at 593.

9 The clerk is directed to enter judgment for plaintiff and
10 against defendant and to close the file.

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12 IT IS SO ORDERED.
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17 VAUGHN R WALKER

18 United States District Chief Judge
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